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On the Issue of Real Estate Mechanism Transfer by One Publicly-Legal Formation Into the Ownership of Another

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The article is devoted to a problem of definition of legal nature of the mechanism of real estate transfer by one public formation into the ownership of another. The author has come to a conclusion that the mechanism of such property transfer fixed in current legislation has a mixed legal nature combining administrative-legal and civil-law elements.

Keywords: public property, real estate, transfer of property of a public formation into the ownership of another, deed of conveyance

Point. As well as any other participant of civil legal relations, Russian Federation and the RF subjects are entitled to decide independently an issue on legal and actual destiny of real estate belonging to them, in particular, to dispose of it. The character of relations arising from this will much depend on a personality of the subject which the state enters relations with. The cases of mutual relations between publicly-legal formations of a different level have the greatest specificity. The basic problem is vagueness of the legislator's decision on issue of a legal nature of the mechanism of real estate objects transfer being in public property, by one publicly-legal formation into another. Current legislation does not contain an unequivocal decision of the issue on the character of similar transfer: whether it is administrative or civil-law, there is no unity of views in the doctrine either. It is deemed, that current legislation allows to speak about a mixed legal nature of the mechanism of real estate transfer from one own public formation into the ownership of another in favour of which the following arguments can be given.

Example. In modern literature the predominant view is (V.A. Dozortsev, 1998 (P. 241-242), E.A. Sukhanov, 1998 (P. 215-217), D. Pyatkov, 2003 (P.94-101), K.D. Gaybatova, 2002 (P. 6-7) V.G. Golubtsov, 1999 (P.23), whereby after the completion of the distribution of state property in process of demarcation, issues of transfer of state (or municipal) property from one owner to another public can and should be resolved only by civil law (contract) basis, because they become a general rule, the relationship of conventional ownership.

This idea, which is based on the need for state civil legal form of the exercise of its

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powers of management of immovable property of the Treasury, has received the realization in the current legislation. However, the trend of modern legislation relating to the situation in the country administrative reform and the reform of local government, forced to take a different view on the status quo. In our view, with the current conditions we can speak of a new, specific legal forms through which public education dispose of their property, which has a mixed character, ie combining public (administrative) and private (civil) began.

The emergence of this new legal form is directly related to the upcoming narrowing the sphere of private relations, to which can serve public education. The main criterion of such restrictions are the objectives pursued by the State and arising from his public and legal nature. Legislator narrowing the sphere of state involvement in civil relations is realized through various legal means, among which special importance is the restriction of property that may be owned by public legal entities as a result, leading to the restriction list of reasons for acquiring rights to public property.

The list of such cases is set to claim 11 st.154 federal law of 22.08.2004 №122-FL (CL Russian Federation, 2004), in accordance with which the ownership of the Russian Federation may be a limited number of types of property. Criterion for property reference to a certain kind is property designation (for example, intended for maintenance of strategic interests of Russian Federation, for maintenance of activity of corresponding bodies, etc.). Similar positions by the legislator have been offered for other publicly-legal formations – the Russian Federation subjects and municipal ones as well.

The specified restriction of kinds of property also entails reduction of the list of the bases of acquisition of public ownership right. The latter results it he fact that current legislation directly fixes cases where property which is in the ownership of one public formation, can be transferred into the ownership of another public formation.

Owing to item 11 of article 154 of Federal law №122-FL on 22.08.2004, being in Federal property (property of subjects of Russian Federation, the municipal property) estate which can be in the ownership of other public formations, is subject to gratuitous transfer to corresponding public formation in case:

1) if being such property in Federal ownership (the Russian Federation subjects property, municipal property) is inadmissible, including as a result of distribution of powers between federal bodies of state authorities, bodies of state authorities of the Russian Federation subjects and local governments;

2) if specified property is used by bodies of a corresponding public formation (Federal bodies of state authorities, bodies of state authority of the Russian Federation subjects, local governments); Federal, state and municipal unitary enterprises; Federal, state and municipal authorities for the purposes established by current legislation.

Thus, modern legislation analysis allows to make some conclusions. Firstly, its basic tendency is restriction of kinds of property which can be in the ownership of publicly-legal formations. Secondly, these objects can be transferred by one publicly-legal formation into the ownership of another, evidently, only in the cases directly provided by current legislation. Thirdly, an issue on a legal nature of such gratuitous transfer of corresponding property is left open.

At the same time, it is obvious, that statutory acts provisions of early 90th operating in the sphere of differentiation of state property, cannot be applied to the legal relations in question. Therefore, transfer of property cannot occur within only administrative or civil-law relations,

their balanced combination is required. It, in its turn, leads to a conclusion that the legislator, in essence, offers a new mechanism of real estate transfer by one publicly-legal formation into another's property.

As cases of alienation of immovable property a public education in the ownership of another are different from the common grounds of (terminating) property rights under the Civil Code, the legislator has secured a special procedure for such exclusion. This is in accordance with claim 11 st.154 federal law of 22.08.2004 №122-FL, and applies to the transfer as a distribution (property complexes of enterprises and institutions) and undistributed estate.

Schematically, it looks as follows:

1) If you have any reason to transfer the property authorities of public entities, property which is subject to transfer, send the proposal to transfer such property to the authorities of public education, conducting transmission facilities;

2) authorized by the authorities of public education, conducting the transfer of property to make a decision on the transfer of items from his property in the ownership of another public education, which approves the lists of transferred facilities;

3) directly to the broadcast property of the ownership of one of public education in the ownership of another executed deed of assignment, which includes the personalized features of objects. For a deed of transfer in the law establishing special requirements: a) the act of transfer drawn up and signed by the authorized authority of public education, conducting the transfer of property, and then within three days after the above decision on the transfer of objects is sent to public education carried out by the adoption of the property, and b) the act of transfer should be signed by the authority of public education, conducting the adoption of the property, and submitted (returned) public education carried out by the transfer of objects in three weeks, and c) a signed deed of assignment within one week of receipt of organs of public education, conducting the transfer of property, it seems they have authorized authorities for approval and changes to the roster of government (municipal) property;

4) the rights to properties that are in public ownership, recorded simultaneously with the rights to the land on which they are located, on the basis of the aforementioned solutions signed transfer reports and other documents required by law.

According to the legislator, the given order of real estate transfer by one public formation into the ownership of another has an administrative character. It is the purpose of item 11 of article 154 of Federal law №122-FL on 22.08.2004, that directly specifies, that the Russian Federation Civil Code provisions and the law on the state registration, including those defining the moment of the right of ownership origin, can be applied in the part which does not conflict with the given law to legal relations, arising from such transfer.

But, in our opinion, analyzed the normative act has consistently failed to implement the idea of public (administrative) order the transfer of property, because the analysis of the law allows you to emphasize a number of private law (discretionary) started the transfer, which are indicative of the mixed nature of the investigated relationships.

So, specified dispositive beginnings of property transfer by one public formation into the ownership of another are present both at the stage of the authorized bodies acceptance of the administrative act (decision on transfer), and at the stage of its execution.

In the first case, they show that the initiative on transfer of objects of the real estate, made out by means of offers on transfer, belongs not to their proprietor, but to the subject to whom

property will be transferred. Accordingly, the parties have a possibility to solve independently, which particular property will be transferred, and which one will not be. Thus, item 11 of article 154 of Federal law №122-FL on 22.08.2004 specially stipulates, that property transfer by one public formation into the ownership of another which has not been included in the corresponding offer is inadmissible. It means that there is mutual consideration between public formations aimed at coordination of transferred objects list. Hence, it follows, that the legislator admits possibility of occurrence of disagreements between them concerning a structure and quantity of transferred real estate which resolution order has not been settled by the named law.

Additional argument in favour of the given statement is the position of the Constitutional court of Russian Federation which has set forth, that item 11 of article 154 of the law fixing the order of gratuitous transfer of property which is in the ownership of the Russian Federation subjects into the Federal ownership, assumes necessity of will of the Russian Federation subjects on such transfer, agreements achievement between Federal authorities of the state power and state authorities of the Russian Federation subjects and does not admit any compulsory alienation of property which is in the Russian Federation subjects' ownership (CL Russian Federation, 2006). Similar explanations have been given by the Constitutional court of Russian Federation concerning property transfer order from municipal formations into the Federal ownership and ownership of the Russian Federation subjects as well (Vestnik CC RF, 2007; CL Russian Federation, 2007).

In the second case, the law directly specifies that after the decision made by the authorised body on transfer of objects the public formation carrying out their transfer acquires a duty on transfer, and the other party carrying out their acceptance, – a duty on property acceptance according to the deed of transfer. Thus, the given statutory act provides a detailed procedure of drawing up and signing such a transfer deed. This indicates that the legislator allows the possibility of disputes between public entities about the composition and number of transferred real estate.

In addition to stated dispositive beginnings, it is necessary to consider another moment having a basic meaning. The sense of property transfer by one public formation into the ownership of another according to the considered order is in the change of property relations, i.e. in the termination of the right of ownership at the transferring subject and in its occurrence at the accepting. All this evidently testifies that by transfer (alienation) of the objects which are in the public property, there are classical «property relations which have been not complicated by imperious character and which are the subject of civil-law regulation» (V. Yakovlev, 2007. P.32-33). Therefore, an administrative-legal form with the help of which, according to the legislator, such transfer of objects should be carried out, does not influence on the essence of arising relations. As, at property transfer by one public formation into the ownership of another civil-law property relations, i.e. property relations arise, it is necessary to come to a conclusion that one administrative act for their change is not enough, since the state, as well as any other participant of civil relations, is the independent, competent proprietor of property belonging to him. Therefore, for the termination of his property right another public formation needs such a property right to be acquired.

To confirm the findings, analyze the current procedure for the transfer of the objects in the public domain. Due to the fact that the state is a distinct legal entity, combining the properties of the support of public authorities and the owner of

the property, it imposes a kind of «fingerprint» for his actions in the implementation of its own rights, including property rights. On the one hand, the sovereign public, participating in legal action by public authorities, government takes power solutions, is done with the help of administrative acts. On the other hand, as the owner of real property, enter into relations with other such independent owners, it has already committed the transaction, enter into contracts, etc., as private property relations the state does not have any advantage and power prerogatives. Therefore, for the alienation of the object owned by the state, as a general rule and require an administrative act that mediates the adoption of appropriate decisions, and civil legal act are drawing up the transfer of ownership.

Thus, upon transfer of state-owned immovable property in his ownership of another public education, to send him a proposal to transfer specific objects, the state as a powerful entity decides on such transfer, ie administrative act. As indicated in paragraph 11 st.154 federal law of 22.08.2004 № 122-FL, directly from the act implies the duty of public education, conducting the transfer of property, transfer, and in public education, conducting the adoption of the property – to take the appropriate objects. In other words, the administrative act, the authority processing the decision to transfer the property creates an obligation on his transfer, but such an obligation is not typical for administrative relations, it is of private nature, because mediates the dynamics of property relations.

As a result, you should come to the conclusion that by virtue of paragraph 1 of Article 8 of the Civil Code the decision to transfer the property a public education in the ownership of another is an act of the state body or local self-government are prescribed by law as grounds for the emergence of civil rights and responsibilities. Accordingly, the obligation itself to the transfer of property is a civil law nature and in conjunction with an administrative act acts grounds for a change in civil relations.

As already noted, the legislator seeks to put the relations on transfer of immovable property a public education in the property of another from the sphere of civil law regulation, allowing the possibility of a subsidiary of the latter. Therefore, the obligation to transfer the objects in the public domain, requiring the use of civil-legal forms, executed in a specific way – through the drafting and signing of the deed of transfer, but it does not alter the private nature of the analyzed relationships.

Resume: Thus, at alienation of real estate belonging to the state by the state into the ownership of another public formation having made an offer on transfer of concrete objects to it, the state as an imperious subject makes a decision on such transfer, i.e. an administrative act. As item 11 of article 154 of Federal law №122-FL on 22.08.2004, specifies the duty of the public formation carrying out property transfer directly following from this act is to transfer, and the public formation carrying out acceptance of property is to accept corresponding objects. In other words, an administrative act making out a decision on property transfer, generates an obligation on its transfer, but such an obligation is not typical for administrative relations, it has private-legal character since mediates dynamics of property relations. Accordingly, the mechanism of real estate transfer fixed in current legislation from property of one public formation into the ownership of another has a mixed legal nature combining administrative-legal and civil-law elements.

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К вопросу о механизме передачи недвижимого имущества одним публично-правовым образованием в собственность другого

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Статья посвящена проблеме определения правовой природы механизма передачи недвижимого имущества одним публичным образованием в собственность другого. Автор пришла к выводу о том, что закрепленный в действующем законодательстве механизм передачи такого имущества имеет смешанную правовую природу, сочетающую в себе административно-правовые и гражданско-правовые элементы.

Ключевые слова: публичная собственность, недвижимое имущество, передача имущества из собственности публичного образования в собственность другого, акты передачи.